Supreme Court, U.S.
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No. 96-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DORF & STANTON COMMUNICATIONS, INC. and HILL, HOLLIDAY, CONNORS, COSMOPULOUS, INC.,

and

JOHN LABATT LIMITED; LABATT BREWING COMPANY LIMITED; LABATT USA, INC.; and LABATT IMPORTERS, INC.,

Petitioners,

vs.

MOLSON BREWERIES, MOLSON BREWERIES U.S.A. INC., MILLER BREWING CO., MARTLET IMPORTING CO., and MOLSON BREWERIES OF CANADA, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ETHAN HORWITZ
(Counsel of Record)
IRA JAY LEVY
DARBY & DARBY
805 Third Avenue
New York, New York 10022
(212) 527-7700

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state as follows:

Respondent Molson Breweries is a Canadian Partnership owned by the Molson Companies, Fosters Brewing Group, and Miller Brewer of Canada Ltd. The Molson Companies and Foster Brewing Group have shares issued to the public. Miller Brewing of Canada Ltd. is a wholly owned subsidiary of Miller Brewing 1855 Inc., for which no shares are issued to the public. Miller Brewing 1855 Inc. is a wholly owned subsidiary of Miller Brewing Company, for which no shares are issued to the public.

Respondent Molson Breweries U.S.A., Inc. is a wholly owned subsidiary of Molson Breweries U.S. Holdings Inc., which is in turn a wholly owned subsidiary of M.B.C. Holdings, Inc., which is itself a wholly owned subsidiary of Respondent Miller Brewing Company. Molson Breweries U.S.A. Inc. owns no non-wholly owned subsidiaries.

Respondent Miller Brewing Company states that its parent company is Phillip Morris Companies Inc., which is a publicly traded company. Miller Brewing Company owns the following non-wholly owned subsidiaries: Celis Brewery, Inc., Shipyard Brewing Co. L.L.C., Cerveceria' Americana, S.A., and Miller Brewing do Brasil Ltda.

Respondent Martlet Importing Company states that it is a wholly owned subsidiary of Molson Breweries U.S. Holdings Inc., which is in turn a wholly owned subsidiary of M.B.C. Holdings, Inc., which is in turn a wholly owned subsidiary of Respondent Miller Brewing Company. Martlet Importing Company owns no non-wholly owned subsidiaries.

Respondent Molson Breweries of Canada Ltd. states that it is a wholly owned subsidiary of respondent Molson Breweries.

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Respondents, Molson Breweries, Molson Breweries U.S.A. Inc., Miller Brewing Co., Martlet Importing Co. and Molson Breweries of Canada, Ltd. (collectively, "Miller"), respectfully request that this Court deny the Petition for a Writ of Certiorari filed by Petitioners Dorf & Stanton Communications, Inc.; Hill, Holliday, Connors, Cosmopulous, Inc.; John Labatt Limited; Labatt Brewing Company Limited; Labatt USA, Inc. and Labatt Importers, Inc. (collectively, "Labatt") seeking review of the opinion of the United States Court of Appeals for the Federal Circuit decision affirming the

multiple orders of the United States District Court for the Southern District of New York directing Petitioner Dorf & Stanton Communications, Inc. to produce certain documents improperly withheld on the asserted ground of attorney-client privilege.

SUMMARY OF ARGUMENT

Petitioners have not established that a conflict exists among the Circuits as to the standard of appellate review applicable to discovery orders of a district court of the type at issue here. Such orders are uniformly subject to the same standard of review, abuse of discretion, as was applied by the Federal Circuit. There is no issue warranting review by this Court.

STATEMENT OF THE CASE

A. Introduction

The dispute forming the basis for the instant Petition for a Writ of Certiorari surrounds three documents originally withheld from production by a subpoenaed third party[1] on the ground of attorney-client privilege. After conducting two hearings on Miller's motion to compel, the United States District Court for the Southern District of New York ("the district court") ordered the subject documents produced after ruling that the Petitioners had not established that the claim of privilege was well taken, and also, that the documents in question, which it ultimately reviewed *in camera*, were not privileged. The district court ruled in the alternative that Petitioners' failure to comply with the applicable federal and local rules of civil procedure constituted a waiver of the privilege, regardless of the documents' content. These rulings were subsequently affirmed by the United States Court of Appeals for the Federal Circuit ("the Federal Circuit") on the grounds that

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[1] While the present Petition has been taken in the name of all Petitioners and relates to documents created by the third party Dorf & Stanton Communications, Inc., Labatt, plaintiff in the underlying action, has intervened, asserting that it is the proponent of any applicable privilege. Dorf & Stanton is also represented here, as it was below, by Labatt's counsel.

Petitioners did not establish privilege and, alternatively, that privilege was waived.

B. Factual Setting

In November 1993, Labatt filed suit against Miller in the United States District Court for the Eastern District of Michigan, alleging trademark infringement and related claims stemming from Labatt's assertion of proprietary rights in the terms ICE, ICE BEER, ICE BREWED and ICE BREWING. In April 1994, Labatt filed a second complaint in the same court against Miller alleging patent infringement. These two cases were consolidated for discovery purposes. Pet. App. at 29a-30a.

On May 9, 1994, a meeting was held to discuss marketing strategies related to Labatt's ice beer products. At this meeting, several employees of Petitioner Dorf & Stanton, a New York-based public relations firm used by Labatt to promote its ice beer products, took notes which now form the basis of the present dispute between the parties. Pet. App. at 2a.

On September 20, 1994, Miller caused a subpoena to be issued on Petitioner Dorf & Stanton pursuant to Rule 45, Fed. R. Civ. P. The subpoena bore the civil action numbers of the consolidated Michigan cases and directed Dorf & Stanton to produce documents and provide a witness to appear for deposition pursuant to Rule 30(b)(6), Fed. R. Civ. P. Pet. App. at 30a.

In response to the subpoena, Labatt produced certain documents in a redacted form, and identified in a privilege log ("the first privilege log") others which were withheld in their entirety. The first privilege log, produced five weeks after receipt of the subpoena, included only one of the documents presently at issue. As will be discussed in greater detail below, the remaining documents on which the instant Petition is focused were among those produced in redacted form and not originally listed by either Labatt or Dorf & Stanton as privileged.

Miller moved to compel production of the documents relating to the May 9 meeting withheld by Labatt and identified in the first privilege log. The motion was heard by Judge Patterson, sitting as the duty judge for unassigned cases, on November 22, 1994. Judge Patterson offered to review the documents *in camera*. However, Labatt's counsel failed to bring the documents to the hearing. Pet. App. at 22a.[2] Accordingly, based upon the description of the documents contained in the first privilege log, the district court ruled that "[Petitioner] has not shown that the lawyer client privilege has been properly taken with respect to any of those documents." Pet. App. at 19a. The district court thus ordered the documents produced. *Id.* at 20a.

In response, Labatt produced all but one of the documents subject to the discovery order. After waiting three weeks, Labatt sought further review by filing a motion asking the district court to modify its order with respect to the one document appearing in the first privilege log which it decided not to produce, notwithstanding the order to do so, while also identifying as privileged two additional documents which now appeared in a newly submitted privilege log ("the second privilege log").[3] These new documents, relating to the May 9

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[2] In this regard, Labatt's accusation that the district court granted Miller's motion to compel without reviewing the disputed documents, Pet. at 8, is wholly disingenuous. The fact that cannot be disputed is that "[Labatt's] counsel, who is also counsel to [Petitioner Dorf & Stanton], . . . failed to bring the documents demanded to the hearing on [Miller's] motion to compel, so that when the Court requested review of the documents in camera, they were not available." Pet. App. at 22a. Notwithstanding, Labatt's attempt to assign blame to the district court for its own failure is ultimately a moot point as the district court subsequently reviewed the contested documents *in camera*.

[3] In its motion requesting the district court to modify its previous order, Labatt identified all three of the documents at issue in its second privilege log. In so doing, however, Labatt changed the description of the previously unproduced document. As a result, Miller was under the mistaken impression that four documents were at issue (*i.e.*, the three documents appearing in the second privilege log and the one previously unproduced document). As pointed out by the Federal Circuit, "Miller, not having the

(Footnote continued)

meeting but not involved in the November 22 hearing, had been previously produced by Labatt in redacted form, yet had never been identified as being subject to a claim of privilege and did not appear in the first privilege log. Pet. App. at 4a. In response, Miller not only opposed Labatt's motion for modification, but also cross-moved to compel production of these additional documents.

In support of its plea to the district court both to reverse its initial decision and to shield previously "secretly privileged" documents, Labatt submitted to the district court, under seal, all the documents in which it claimed privilege, along with multiple affidavits purportedly from the authors of those documents. On January 4, 1995, the district court conducted a hearing on Labatt's motion for modification, reviewing all the documents *in camera*. The district court adhered to its November 22, 1994 order, stating:

> [Petitioners] still have not established that the privilege ever existed as to any of the documents sought to be protected. The documents are notes of personnel of the independent advertising agencies representing Plaintiffs made at a meeting scheduled to assist them in marketing and advertising Plaintiffs' product, "Ice Beer"; Plaintiffs' attorneys were present at this meeting. There has been no showing that [Dorf & Stanton was] seeking legal advice at the meeting. Rather, it appears that [Petitioners] were briefing the personnel of [Dorf & Stanton] so that the content of the advertising placed by the agencies would not undercut the theories expounded in the litigation. The documents themselves do not indicate either the seeking of legal advice or the confidentiality of their contents.

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benefit of seeing [the previously unproduced document] is counting it twice." Pet. App. at 3a. As a result of this confusion, Miller sought to compel production of four documents when, in fact, only three documents are in dispute.

Pet. App. at 23a.

Additionally, the district court found in the alternative that Labatt had waived its claim to privilege by failing to satisfy the applicable federal and local rules of civil procedure. Specifically, the district court pointed out that Labatt "[failed] to provide a complete privilege log demonstrating sufficient grounds for taking the privilege." Pet. App. at 23a.

On January 19, 1995, the district court ordered production of these documents but granted a stay to allow for appeal. Pet. App. at 21a to 24a. Labatt proceeded to appeal the district court's order to the United States Court of Appeals for the Second Circuit. Miller moved in the Second Circuit to bring the jurisdictional issue to the court's attention,[4] and that court subsequently transferred Labatt's appeal to the Federal Circuit. *Dorf & Stanton Communications v. Molson Breweries*, 56 F.3d 13 (2d Cir. 1995). Pet. App. at 28a to 35a.

On appeal, the Federal Circuit affirmed, holding that the district court did not abuse its discretion in ordering the documents produced. The Federal Circuit also held that the district court did not abuse its discretion in alternatively ordering the documents produced due to Labatt's waiver of the attorney-client privilege as a result of its failure to comply with the applicable federal and local rules. Pet. App. at 8a to 9a. It is from the Federal Circuit's decision affirming these discovery orders that Labatt has submitted this Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Among The Circuits Relevant To The Instant Petition

There is no conflict among the Circuits regarding the appellate standard of review afforded to discovery orders relating to the attorney-client privilege such as issued by the court below.

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[4] As the underlying action involves issues of patent law, appeal should have been taken to the Federal Circuit, not to the Second Circuit.

Labatt asserts that there is a conflict among the circuits and that the Second Circuit is in the minority of jurisdictions which review discovery orders touching upon issues of attorney-client privilege for an abuse of discretion, rather than reviewing such orders *de novo*. Labatt urges that this Court resolve the conflict and mandate that the Circuits adopt a *de novo* standard of review for all orders implicating the attorney-client privilege.

Labatt incorrectly asserts that the majority of Circuits review discovery orders relating to attorney-client privilege *de novo*. In fact, each of the Circuits which have considered such orders have reviewed them under an abuse of discretion standard, i.e., the same standard applied by the Circuit Court here. *See, e.g., Assoc. for Reduction of Violence v. Hall*, 734 F.2d 63, 65 (1st Cir. 1984) ("At the outset, we assume, without deciding, that the district court did not *abuse its discretion* in ruling that the documents it viewed *in camera* were privileged.") (emphasis added throughout unless otherwise indicated); *U.S. v. Adlam*, 68 F.3d 1495, 1499 (2d Cir. 1995) ("We review district court rulings on claims of attorney-client privilege and work product for *abuse of discretion*"); *Centifanti v. Nix*, 865 F.2d 1422, 1432 (3d Cir. 1989) ("We have examined the three documents, and we find that the district court *did not abuse its discretion* in holding that the documents are privileged from discovery."); *Fortson v. Winstead*, 961 F.2d 469, 475 n.5 (4th Cir. 1992) ("Appellants also contend that the district court erred in upholding the general partner's assertion of the attorney-client privilege against the limited partners. . . .We think the court *did not abuse its discretion* in ruling as it did, and we affirm."); *U.S. v. Moody*, 923 F.2d 341, 351 (5th Cir.), *cert. denied*, 502 U.S. 821 (1991) ("In federal criminal proceedings, the attorney-client privilege is applied pursuant to Federal Rule of Evidence 501. As with other rulings on evidence, even if a ruling on the privilege is erroneous [*an abuse of discretion*], it is not reversible unless a substantial right of the party is affected. . ."); *Arkwright Mut. Ins. Company v. National Union Fire Ins. Co.*, No. 93-3084, 1994 U.S. App. LEXIS 3828 at *15 (6th Cir. 1994) (Unpub.) ("The district court *did not*

abuse its discretion in holding that documents 1-4, 8, 27-28, and 31-34 are not protected by the attorney-client privilege"); *U.S. v. Davis*, 1 F.3d 606 (7th Cir. 1993), *cert. denied*, 510 U.S. 1176 (1994) ("the district court's denial of Davis' motion [to bar testimony intended to divulge privileged information] was well *within its discretion*"); *Zar v. South Dakota Board of Examiners of Psychologists*, 976 F.2d 459, 463-64 (8th Cir. 1992) ("With respect to the remaining documents in question, we find that the court *did not abuse its discretion* in determining that they were protected by either the attorney-client privilege or the work product doctrine"); *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1359 (9th Cir. 1981) ("We have examined the *in camera* documents, and we are unable to say that the district judge *abused his discretion* in determining that these documents were privileged."); *Motley v. Marathon Oil Company*, 71 F.3d 1547, 1551 (10th Cir. 1995) ("We cannot say that the district court *abused its discretion* in concluding that the communications in issue were for the purpose of providing legal rather than business advice."); *Cox v. Administrator U.S. Steel and Carnegie*, 17 F.3d 1386, 1419-20 (11th Cir. 1994), *cert. denied*, 130 L.Ed.2d 784 (1995) ("We cannot say, however, that the District Court *abused its discretion* in determining that the communications USX had with its attorneys, after *Trailways* and prior to its decision to seek making direct payments, might bear on what USX knew about the legality of the plan, and when USX knew it. Accordingly, the order of the District Court is affirmed."); *Tuite v. Henry*, 98 F.3d 1411, 1413, 1415-16 (D.C. Cir. 1996) ("A district court's discovery order is reviewed under an *abuse of discretion standard*. . . .In this case, we find no abuse of discretion in the District Court's determination that appellees' claims of [investigatory] privilege were properly raised.")

Contrary to Petitioners' claim, there is no conflict among the Circuits on this question. Indeed, the cases which Petitioners cite to support the alleged conflict among the Circuits show that the standard of review applied depends on the underlying issues. *See United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991) ("we review the legal issues underlying the

privilege claim *de novo* but review the facts underlying the claim of privilege for clear error."); *United States v. Campbell*, 73 F.3d 44, 46-47 (5th Cir. 1996) ("The application of the attorney-client privilege is a question of fact, to be determined in the light of the purpose of the privilege and guided by judicial precedents. The clearly erroneous standard of review applies to the district court's factual findings. We review the application of the controlling law *de novo*."); *Cox*, 17 F.3d at 1413 ("To the extent that the appeals involve mixed questions of law and fact, regarding the applicability of the attorney-client privilege to particular communications that the plaintiffs wish to discover, our review is plenary.").[5]

Similarly, *In Re Grand Jury Proceedings Oct 12, 1995*, 78 F.3d 251 (6th Cir. 1996) and *United States v. Ortland*, 109 F.3d 539 (9th Cir. 1997) do not touch on the basis of the district Courts ruling. Rather, each relates to the issue of waiver of attorney-client privilege, not to review of an order that documents be produced for failure to establish that the documents are privileged.

Nowhere is this point more clear than in one of the cases cited by Labatt in its Petition. In *In re Allen*, 106 F.3d 582 (4th Cir. 1997), the court reviewed the district court's ruling that "if a client retains an attorney to perform the 'rudimentary' task of conducting an investigation, that assignment can never constitute legal work and so the attorney-client privilege does not protect communications between the client and the investigating attorney." *Id.* at 601. Explaining the applicable standard of review, the court stated as follows:

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[5] The remaining authority cited by Labatt is wholly irrelevant to this issue. In *In Re Grand Jury Subpoenas*, 906 F.2d 1485 (10th Cir. 1990), the court opined on the standard of review applicable to a district court's finding of contempt. Similarly, *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987) involved the question of the applicable standard of review for interlocutory decisions certified pursuant to 28 U.S.C. § 1292(b). Neither of these opinions is probative on the issues for which they are cited.

> The parties agree that our standard of review is two-fold. To the extent a district court's holding that the attorney-client privilege does not protect communications rests essentially on determinations of fact, we review those determinations for clear error. Our review is *de novo*, however, to the extent the court's holding rests on application of controlling legal principles to the facts.

Id. (citations and internal quotation marks omitted). The court then held that the error in the district court's ruling was one of law, *i.e.*, that the subject communications could never be privileged.

In contrast, no such legal determination was made here by the district court. Judge Patterson did not rule that communications between attorneys for a company in litigation and a promotional firm such as Dorf & Stanton could never be privileged. Rather, he simply ordered the documents produced, concluding that Dorf & Stanton never established that the documents in issue were privileged, and alternatively, that any such privilege was waived. It was this discovery order which was affirmed by the Federal Circuit.

The Circuits are in unanimity on the issue of the standard of review applied to a district court's discovery order, even if such an order touches on or implicates the attorney-client privilege. Accordingly, certiorari should not be granted.

B. The Second and Third Questions Need Not Be Reached

Petitioners next argue that the courts below misinterpreted issues of federal procedure in ruling and subsequently affirming that any applicable privilege had been waived. Specifically, Labatt's position is that the Local Rules of the Southern District of New York ("Local Rules") are in conflict with the Federal Rules of Civil Procedure and, as such, it is mandated that the latter prevail. Therefore, according to Labatt, under the Federal Rules of Civil Procedure, it would not have been deemed to waived privilege.

Because the determination of waiver of any privilege formed only an alternative basis for the decision in each of the lower courts, this Court need not reach these questions. The Federal Circuit applied the proper standard of review, namely abuse of discretion, to the principal ground for ordering the production. Thus, questions presented which presume that the underlying documents were shown to be privileged by Petitioners are moot.

Moreover, the questions presented fail to raise an important issue warranting this Court's attention. First, no conflict exists; the local rules merely clarify what is required by the Federal Rules of Civil Procedure. Second, wholly independent of its failure to comply with the Local Rules, Labatt waived its claim to privilege by failing to comply with the Federal Rules of Civil Procedure. Thus, Labatt's argument that there is a conflict between the Local Rules and their federal counterparts is both inaccurate and irrelevant.

1. There Is No Conflict Between The Federal Rules Of Civil Procedure And The Local Rules Of The District Court

Labatt's argument that Rule 83(a)(2), Fed. R. Civ. P. prohibits enforcement of a local rule in conflict with the Federal Rules of Civil Procedure is incorrect. Rule 83(a)(2) states:

> A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

In this regard, Rule 46(e)(2)[6] of the Local Rules does not impose a requirement of form; it imposes one of substance. Further, nothing in the language of Rule 83(a)(2) or the authority cited in its Petition supports Labatt's premise that Rule 83(a)(2) prohibits the application of a local rule more

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[6] The Local Rules were amended effective April 15, 1997. Rule 46(e)(2), in amended form, now appears as Local Civil Rule 26.2

stringent than a Federal Rule - this is simply Labatt's take on it. However, even accepting Labatt's interpretation of Rule 83(a)(2), Local Rule 46(e)(2) is not more stringent than its federal counterpart - it is merely more specific.

The Local Rules enumerate the specific information that must be provided by a party withholding discovery on the basis of privilege in order to fulfill the "adequate information" requirement of Federal Rule 45. *See Carte Blanche Pte., Ltd. v. Diners Club Int'l, Inc.*, 130 F.R.D. 28, 32 (S.D.N.Y. 1990) ("The local rules supplement the federal rules governing civil proceedings"). Although Local Rule 46 is named "Interrogatories", its requirements extend to "any interrogatory or document demand." *Id.* at 30.[7]

Accordingly, under this Local Rule, the failure of a subpoenaed party to provide adequate information about the privilege it claims will result in a waiver of that privilege. *See, e.g., Allstate Life Ins. Co. v. First Trust Nat'l Ass'n*, No. 92 Civ. 4865 (SWK), 1993 U.S. Dist. LEXIS 5461 (S.D.N.Y. Apr. 23, 1993); *Kahn v. General Motors Corp.*, No. 88 Civ. 2982 (PNL), 1992 U.S. Dist. LEXIS 1489 (S.D.N.Y. Feb. 11, 1992); *Carte Blanche*, 130 F.R.D. at 28.

The district court expressly found that Labatt failed to provide adequate information to preserve any claims of privilege. This finding is not surprising given that Labatt's first privilege log did not even specify the type of privilege claimed (attorney-client or attorney work-product) and did not even include the majority of the documents that Labatt now claims are privileged. The law is clear:

> In failing to specify work product as the particular privilege protecting its various documents, [the subpoenaed party], assisted by [its counsel] waived work product immunity for the documents. The Court rejects plaintiff's argument that, first, no

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[7] In fact, new Local Civil Rule 26.2 expressly applies to *all* forms of discovery.

> violation of local Civil Rule 46(e) occurred, and second, that such a violation may not operate as a waiver of the immunity. Local Civil Rule 46(e) is clear in its provision that "the attorney asserting the privilege shall in the objection to the interrogatory or document demand . . . *identify the nature of the privilege (including work product) which is being claimed.*" . . . [P]laintiff protests the Magistrate's ruling as being one based on a "hypertechnicality." However, the importance of local rules should not be taken so lightly. The local rules supplement the federal rules governing civil proceedings. Fed. R. Civ. P. 83. Accordingly, their importance should not be diminished by skirting their application when the results prove harsh to a party.

Carte Blanche, 130 F.R.D. at 32. (emphasis in original).

In sum, the law is clear that Labatt waived any privilege by its failure to comply with Federal Rule of Civil Procedure 45(d) and/or Local Rule 46(e).[8] Labatt did not describe its claimed privileges adequately in its privilege logs (as to either the reasons privilege was justified *or even the type of privilege claimed*). It raised claims of privilege *months* after the 14-day objections period of Rule 45 had passed. And, it failed to produce the documents for *in camera* inspection in November when called upon by Judge Patterson to do so.[9] There can be no doubt that Labatt waived any privilege.[10]

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[8] Labatt claims that Local Rule 46(e) should not apply to it because its lawyers are from Chicago rather than New York. Pet. at 20. It suffices to say, ignorance of the law is no excuse. Labatt's position is untenable and disingenuous. Indeed, Petitioner Dorf & Stanton's office is in New York; Labatt was represented by New York local counsel; and Labatt's counsel has a New York office which was listed as representing Dorf & Stanton, and the attorney arguing the motion was admitted *pro hac vice* and was obligated to familiarize himself with the Local Rules in the Southern District of New York.

[9] The cases cited by Labatt for the proposition that it should have been given a "second chance" to prove the validity of its privilege claims are

(Footnote continued)

Accordingly, Labatt's proposition that Federal Rule 83(a)(2) precludes the application of Local Lule 46(e)(2) as inconsistent with the Federal Rules of Civil Procedure is simply not supported by the facts or the authorities, and is not an issue warranting the grant of the Petition for a Writ of Certiorari.

2. Labatt Waived Any Privilege By Failing To Comply With The Federal Rules Of Civil Procedure

Because the district court determined that each rule (Federal and Local) constituted an independent basis for waiver of any privilege, even accepting Labatt's argument above that waiver cannot be premised on Local Rule 46(e), the end result would not change.

A subpoenaed party that wishes to withhold documents on the basis of privilege must support its privilege claim "by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Fed. R. Civ. P. 45(d)(2). Furthermore:

> A party receiving a discovery request who asserts a privilege or protection but fails to disclose that

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inapposite. *See* Pet. at 20 to 22. Labatt had numerous opportunities to satisfy the requirements of Federal Rule 45(d)(2) and/or Local Rule 46(e). Labatt's first privilege log failed to include *all* the documents in which it claimed privilege. Labatt failed to make a *prima facie* case at the November 22, 1994, hearing before district court and failed even to bring the documents to the hearing. And, on motion for reconsideration, Labatt's second privilege log, including its new "privileged" additions, failed to satisfy either Federal Rule 45(d)(2) or Rule 46(e), even with the support of its several affidavits of "newly discovered" evidence.

[10] Labatt is simply mistaken when it states that "Miller continued to accept the sufficiency of the privilege logs throughout its attempt to compel production before the district court." Pet. at 16. In each of its three briefs before the district court, Miller detailed the ways in which Labatt's privilege logs failed to specify any valid claim of privilege.

> claim is at risk of waiving the privilege or protection. A person claiming a privilege or protection who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why the person should not be held in contempt under subdivision (e).

Fed. R. Civ. P. 45(d) Advisory Committee's Note (1991). The district court ordered the documents produced since it expressly found Labatt failed to comply with Rule 45(d)(2) and, as a result, had waived its claim of privilege. Pet. App. at 21a to 24a. The Federal Circuit affirmed this ruling. Pet. App. at 8a to 9a.

As indicated above, there are two categories of documents at issue: a single document that Labatt rolled over from the November hearing to the January reconsideration hearing (which hearing resulted in the order, affirmed by the Federal Circuit) and two new documents for which Labatt first claimed a privilege going into the reconsideration hearing.

With respect to the first category, the district court's order makes clear that Labatt failed to "provide adequate information" about the basis for the claim of privilege. With respect to the additional documents, the district court also ordered their production since Labatt failed to provide adequate support for its privilege claim. The district court also ordered the documents produced on the alternative ground that Labatt waived privilege by its failure to make its claim within the 14-day period required by Rule 45. *Angell v. Shawmut Bank Conn. Nat'l Ass'n*, 153 F.R.D. 585, 590 (M.D.N.C. 1994).

Under old Rule 45(d)(1), failure of a party to file a timely objection resulted in a waiver of the right to object to the subpoena. *Wang v. Hsu*, 919 F.2d 130, 131 (10th Cir. 1990); *Deal v. Lutheran Hospitals & Homes*, 127 F.R.D. 166, 168 (D. Alaska 1989); *Yamhill Yamaha, Inc. v. Yamaha Motor Corp.*, 6 Fed. R. Serv. 3d (Callaghan) 251, 253 (D. Or. 1986).

Rule 45 was extensively amended in 1991. Among the amendments was an extension of the former 10-day objection period to a 14-day period. According to the Advisory Committee's Notes to the 1991 amendments, subdivision (c), which is new, states the rights of the subpoenaed witness. "Paragraph (c)(2) retains language from the former subdivision (b) and paragraph (d)(1)" and extends the time to respond to fourteen days "to allow a bit more time for such objections to be made." Fed. R. Civ. P. 45(c) Advisory Committee's Note (1991).

> These changes which provide additional protection to the subpoenaed person also make it reasonable to construe the new time limits more strictly *so that failure to timely file an objection would result in a waiver of the right to object to enforcement of a subpoena and of the right to recover the cost of production.*

Angell, 153 F.R.D. at 590; *see also Tutor-Saliba Corp. v. United States*, 30 Ct. Cl. 155, 156-57 (1993) (motion to quash is a Rule 45(c)(2) written objection and must be served within 14 days to be timely). Thus, although under the new rule the time to object has been extended, the consequence of failing to timely object is that the right to object is waived. Labatt admits that it first raised privilege claims some 5 and 13 *weeks* after Miller's subpoena issued (Pet. at 22); long after the 14 days permitted by Fed. R. Civ. P. 45(d)(2). Accordingly, it was proper for the district court to order the production of documents on the alternative ground that Labatt had waived its right to claim privilege.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny Labatt's Petition for a Writ of Certiorari.

Date: May 15, 1997
New York, New York

Respectfully submitted,

Attorneys for Respondents:
MOLSON BREWERIES, MOLSON BREWERIES U.S.A. INC., MILLER BREWING CO., MARTLET IMPORTING CO., and MOLSON BREWERIES OF CANADA, LTD.,

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Ethan Horwitz
(Counsel of Record)
Ira Jay Levy
DARBY & DARBY PC
805 Third Avenue
New York, New York 10022
(212) 527-7700